No. 11150

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

EUGENE E. RITCH and
A. W. HALL, *Appellants,*

vs.

PUGET SOUND BRIDGE & DREDGING CO., INC., a corporation;

JOHN R. RUMSEY, a sole trader doing business as Rumsey & Co., together doing business as RUMSEY PUGET SOUND, a copartnership, *Appellees.*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

APPELLEES' ANSWERING BRIEF

J. CHARLES DENNIS
FRANK PELLEGRINI
TOM A. DURHAM
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STATEMENT OF THE CASE

This is an action under the Fair Labor Standards Act of 1938, as amended, (Sections 201 - 218, Title 29 U.S.C.), hereinafter referred to as the Act, by the appellants, as employees of the appellees and as assignees of other employees, to recover, on their own behalf and as assignees, overtime pay for hours worked in excess of 40 hours a week and an addi-

tional equal amount as liquidated damages and attorney's fees. The Complaint (R. 2-22) consists of thirteen causes of action. Judgment was entered on stipulation between the parties, granting the appellants a recovery on the First, Seventh, Eighth, Ninth and Tenth Causes of Action (R. 34-37). The case was tried by the Court without a jury as to Causes of Action Two, Three, Four, Five, Six, Eleven, Twelve and Thirteen, resulting in the entry by the Court of a separate judgment dismissing the said causes of action (R. 38-39). The appellants have appealed from the judgment dismissing the case as to said causes of action.

The appellees are contractors. They had a contract with the United States (Navy Department) to construct new and additional facilities at the Puget Sound Navy Yard, Bremerton, Washington, consisting of a new reenforced concrete pier, known as Pier 3, a new pump well for a drydock, ship ways for building steel ships and barges, bomb shelters, a five-acre fill and revetment reclaiming tidelands with quay wall, a tool shop, toilet facilities, and an extension to an existing building and to an existing quay wall. The contract also provided for minor repairs to be made to a pier of the Naval Torpedo Station at Keyport, Washington, a few miles away from the

Navy Yard. Pier 3 when completed was to be for the exclusive use of the United States Navy in the repair of naval combat vessels and not for commercial purposes.

The Complaint (R. 2-22) alleges, and the Answer (R. 23-24) admits that the appellant, A. W. Hall, Second Cause of Action (R. 4-5), was employed as an office draftsman and engineer, designing and detailing railroad system, ship ways and pipe systems for Pier 3 and supervised other office draftsmen in similar work; that John W. Jameson, Third Cause of Action (R. 6), was employed as head timekeeper, checking time and figuring weekly pay for employees engaged in the construction work upon said Pier 3; that Ralph O. Lund, Fourth Cause of Action (R. 7), was employed as an office draftsman, designing and detailing facilities for two buildings and personnel shelters in the regular course of the construction work upon said Pier 3; that Henry I. Mayer, Fifth Cause of Action (R. 8-9), was employed as a timekeeper in checking time and payrolls of employees engaged in the construction work on the said Pier 3; that Paul Mehner, Sixth Cause of Action (R. 10), was employed as an office draftsman, detailing plans for the construction work on said Pier 3; that William J. Sheffield, Eleventh Cause of Action (R. 17), was em-

ployed as an assistant timekeeper in the regular course of the construction work on the said Pier 3; that Glenn E. Tyler, Twelfth Cause of Action (R. 18), was employed as a field engineer and draftsman in connection with the regular construction work on said Pier 3; that A. W. Torn, Thirteenth Cause of Action (R. 19-20), was employed as an office draftsman, designing and detailing facilities for Pier 3 and the ship ways, all in the course of the construction of said pier.

Ninety-six percent (96%) of the materials used in the construction work were obtained locally within the State of Washington. Four percent (4%) of the materials were obtained from outside the State of Washington. None of the claimants had any direct connection with the receipt of materials delivered to the job site with the possible exception of Henry I. Meyer and William J. Sheffield who worked on the swing shift as timekeepers and as part of their work checked in, receipted for and oversaw the unloading of materials arriving at the job site during their hours of work (R. 50). The claimant, John W. Jameson, as timekeeper had no direct contact with shipments of materials, his only duties were to keep the time of other employees (R. 50-51). The other claimants, as draftsmen and office engineers, estimated the ma-

terials required on the job, submitted their estimates to the appellees' purchasing agent and after materials were received and in the warehouse, inspected the said materials and performed other duties in connection with field engineering work (R. 51). The appellant, A. W. Hall, for a part of his employment was a draftsman, so employed from January 12, 1941, to April 8, 1941; on May 1, 1942, he was promoted to head draftsman, and thereafter his duties consisted of approximately fifty percent (50%) supervising and fifty percent (50%) designing and drafting (R. 51).

ARGUMENT

Introductory Statement: The District Court rendered its decision on two theories (1) that the dock in question is not an instrumentality of commerce, and (2) that the employees involved in this action were not engaged in commerce or in the production of goods for commerce. The question of whether or not the dock was an instrumentality of commerce we consider to be immaterial in presenting this appeal. We rely on the second of the trial Court's theories, namely, that the employment activities of the claimants related solely to new construction and they were not engaged in commerce or in the production of goods

for commerce. It is noted in this connection that the trial judge expressly approved as applicable to this case the reasoning and decision in *Brue v. J. Rich Steers, Inc.*, 60 F. Supp. 668 (S.D. N.Y.) which was bottomed on exactly that ground. See also *Nieves et al vs. Standard Dredging Corporation* (C.C.A. 1) 9 Wage and Hour Reporter 29. (Federal Reporter Citation not available).

Burden of Proof. The burden is on the appellants to prove that in the course of performing services for the appellees the claimant employees (a) engaged in the production of goods for commerce, or (b) engaged in commerce. *Warren-Bradshaw Co. v. Hall*, 317 U.S. 88.

CLAIMANTS WERE NOT ENGAGED IN THE PRODUCTION OF GOODS FOR COMMERCE

In support of their argument that the claimant employees were engaged in the production of goods for commerce, the appellants contended that the construction of Pier 3 was the initial process in the "production of ships and marine equipment, and that these were subjects of commerce, and also instrumentalities of commerce." (Page 22, Appellants' Brief). They admit there are no cases in point in support of their conclusions.

It is now well settled that while the employee need not participate physically in the productive process, the activity in which he is engaged must have such a close and immediate tie with the process of production of goods for commerce as to be an essential part of it. *Kirschbaum v. Walling*, 316 U.S. 517; *Warren-Bradshaw Co. v. Hall, supra;* further that remoteness of a particular occupation from the physical process of production is a relevant factor in drawing the line. *10 East Fortieth Street Building v. Callus*, 325 U.S. 578. The Courts applying the foregoing rules to cases involving the construction of plants, drydocks and other structures, which when completed were to be used in the production of goods for commerce, have consistently held that the contractors' employees were not engaged in an occupation necessary to the production of goods for commerce. *Noonan v. Fruco Construction Co.*, (C.C.A. 8) 140 F. (2d) 633; *Scott v. Ford, Bacon & Davis*, D.C. 55 F. Supp. 982; *Wells et al v. Ford, Bacon & Davis*, 7 Labor Cases, Par. 61, 929, affirmed without opinion, 6th Cir., 145 F. (2d) 240; *Brue v. J. Rich Steers, supra; Damon v. Ford, Bacon & Davis*, 62 F. Supp. 446; see also: *Dollar v. Caddo River Lumber Company*, D.C., 43 F. Supp. 822; *Ballard v. Consolidated Steel Corporation*, 61 F. Supp. 996; *Barbe v. Cummins Construction Co.*, D.C., 49 F. Supp. 168; (C.C.A.

4) 138 F. (2d) 667. The record in this case conclusively establishes that the appellees are contractors and as such were engaged in a purely local activity, that is, the construction of a pier, which when completed was not to be used for commercial purposes but for war purposes. There is no evidence the appellees or the claimants were ever engaged in producing any ships or parts for ship repairs. The only services performed by the claimants were in prosecution of the construction work. The Administrator of the Wage and Hour Division, Department of Labor, has held that the provisions of the act are not applicable to employees of builders and contractors. In Bulletin 5, Paragraph 12, the Administrator places the following interpretation on the applicability of the Act:

> "The question arises whether the employees of builders and contractors are entitled to the benefits of the Act. The employees of local construction contractors generally are not engaged in interstate commerce and do not produce any goods which are shipped or sold across state lines. Thus, it is our opinion that employees engaged in the original construction of buildings are not generally within the scope of the Act, even if the buildings when completed will be used to produce goods for commerce. There may be particular employees of such construction contractors, however, who engage in the interstate transportation of materials or other forms of interstate

commerce and are for that reason entitled to the benefits of the Act."

This administrative interpretation is entitled to weight. *United States et al v. American Trucking Associations*, 310 U.S. 534.

To sustain their contention the claimants were engaged in the production of goods for commerce, the appellants cite a number of cases. An examination of the cited cases will disclose that in each instance the employer was directly involved in the production of goods for commerce or that the employee furnished services directly contributing to, and necessary for the production of goods for commerce. In this case the evidence conclusively shows that the appellees were at no time engaged in the production of goods for commerce. The only services performed by the claimants were in connection with the original construction of fixed facilities.

CLAIMANTS WERE NOT ENGAGED IN COMMERCE

It is urged by the appellants that the Puget Sound Navy Yard is an instrumentality of commerce and since the construction work constituted an improvement to an already existing instrumentality of commerce this court must hold that the appellees'

employees, performing services in the construction work, are engaged in commerce within the meaning of the Act.

Having assumed that the Navy Yard is an instrumentality of commerce, appellants contend that Pier 3, being an improvement or extension of the facilities, all persons engaged in the construction work were engaged in interstate commerce on the theory that they rendered services essential in the maintenance and repair of the facilities. Cited in support of this contention are the following cases: *Overstreet et al v. North Shore Corp.*, 318 U.S. 125; *Pedersen v. J. F. Fitzgerald Construction Co.*, 318 U.S. 740; *Pedersen v. Delaware, Lackawanna & Western Railroad*, 229 U.S. 146. In these cases the Supreme Court held that employees engaged in maintenance and repair work of an instrumentality used in interstate commerce were themselves engaged in interstate commerce. The undisputed facts in this case show that Pier 3 was a "new, permanent and reenforced-concrete repair pier for naval vessels", which when completed would become a part of the Navy Yard, a major building and repair yard of the United States Navy (R. 48-49). There is no evidence that the work on Pier 3 was in the nature of maintenance or repair work. In view of this record, it is apparent that the

Supreme Court decisions in the foregoing cases cannot be applied to the facts in this case.

In reaching its decision in *Overstreet et al v. North Shore Corp. supra.*, the Supreme Court at Page 128 states:

> "A practical test of what 'engaged in interstate commerce' means has been evolved in cases arising under the Federal Employers' Liability Act (45 U.S.C. Sec. 51 et seq.) which, before the 1939 amendment (see 53 Stat. 1404), applied only where injury was suffered while the carrier was engaging in interstate or foreign commerce and the injured employee was employed by the carrier 'in such commerce' 35 Stat. 65."

In construing the Federal Employers' Liability Act the Supreme Court and this Court have consistently held that employers and employees engaged in *new* construction work are not engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, although the new construction was designed for use and when finished would be used in interstate commerce. One of the foremost cases applying this doctrine is a case decided by this Court under the Federal Employers' Liability Act. In *Raymond v. Chicago, M. & St. P. Ry. Co.*, (C.C.A. 9), 233 F. 239, this Court, in denying a recovery to a workman engaged in driving a tunnel, which when

completed was to become a part of the railroad's interstate system, said at Page 241:

> "We think there is a clear distinction between the facts in that case and those in the case at bar. The plaintiff in error here was engaged in constructing a new instrumentality. When completed it was intended to be used in interstate commerce, but as yet it was no part of the railroad line of the defendant in error, and it had not become an instrumentality in interstate commerce. To the state of facts which is here presented on the pleadings, the language of the Supreme Court in the Pederson Case is applicable. The court said:
>
> 'The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? * * * Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such'."

The Supreme Court decision, sustaining this Court, is found in 243 U.S. 43. In *New York Central Railroad Co. v. Sarah White*, 243 U.S. 188, the employee, a night watchman charged with the duty of guarding tools and materials used in the construction of a new station and new tracks upon the line of an interstate railroad, was held not to be covered by the Federal Employers' Liability Act. The Su-

preme Court stated at Page 191 as follows:

> "The admitted fact that the new station and tracks were designed for use, when finished, in interstate commerce, does not bring the case within the Federal Act. The test is 'Was the employee at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?' *Shanks v. Delaware, L. & W. R. Co.* 239 U.S. 556, 558, 60 L. ed, 436, 438, L.R.A. 1916C, 797, 36 Supp. Ct. Rep. 188. Decedent's work bore no direct relation to interstate transportation, had to do solely with construction work, which is clearly distinguishable, as was pointed out in *Pedersen v. Delaware, L. & W. R. Co.*, 229 U.S. 146, 152, 57, L. ed. 1125, 1128, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N.C.C.A. 779. And see *Chicago, B. & Q. R. Co. v. Harrington*, 241 U.S. 177, 180, 60 L. ed. 941, 942, 36 Sup. Ct. Rep. 517, 11 N.C.C.A. 992; *Raymond v. Chicago, M. & St. P. R. Co.* this day decided (243 U.S. 43, ante, 583, 37 Sup. Ct. Rep. 268). The first point, therefore, is without basis in fact."

The recent decision by the First Circuit Court of Appeals in *Nieves et al. v. Standard Dredging Corporation, supra,* clearly supports the appellee's position the appellant employees were not engaged in commerce or the production of goods for commerce. In that case the plaintiffs were employees of a subcontractor carrying on dredging operations in connection with the construction of a United States Naval base. The Court in discussing the "in commerce" issue said:

> "The work upon which the plaintiffs were en-

> gaged was not repair or maintenance to an existing dry dock and channel; it was new and original construction in preparing a site for such a dock and passageway to it, which had not yet been used in interstate commerce. Thus we feel that the *Raymond* case is controlling and that the plaintiffs were not engaged in commerce within the meaning of the Fair Labor Standards Act."

The appellants' additional contention that the construction work at the Puget Sound Navy Yard was in effect an improvement to a "highway of interstate commerce", as was the work in the case of *Walling v. Patton-Tulley Transportation Co.*, (C.C.A. 6) 134 F. (2d) 945, is without merit. As shown by the evidence, the work in this case was for improvements to the Navy Yard and were not improvements to facilitate navigation on Puget Sound.

In order for the claimants to recover on the theory they performed services in commerce it is necessary for them to show by a preponderance of the evidence that they were actually engaged in commerce, or that their activities were so closely related to the movement of commerce as to be a part of it. *McLeod v. Threlkeld et al.*, 319 U.S. 491. In this case the Supreme Court, denying a recovery to a cook preparing and serving meals to maintenance-of-way employees of an interstate railroad, in pursuance of a

contract between the employer and the railroad company, because the cook was not "engaged in commerce" as defined by the Act, said at page 497:

> "The test under this present act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it. Employee activities outside of this movement, so far as they are covered by wage-hour regulation, are governed by the other phrase, 'production of goods for commerce.'"

In *Armour & Co. v. Wantock et al.*, 323 U.S. 126, 131, the Court in distinguishing the McLeod case said:

> "*McLeod v. Threlkeld*, 319 U.S. 491, which did exclude the employee from the scope of the Act, is not in point here because it involved application of the other clause of the Act, covering employees engaged 'in commerce,' and the test of whether one is in commerce is obviously more exacting than the test of whether his occupation is necessary to production for commerce."

The undisputed evidence is that ninety-six percent (96%) of the construction materials were obtained locally and approximately four percent (4%) of the materials used were ordered and received from outside the State of Washington (R. 49). Some of the interstate shipments of materials went to ap-

pellees' warehouse in Seattle and some directly to the warehouse at Bremerton (R. 49). The appellants did not produce evidence of the amounts of either the intrastate or interstate shipments which were received directly at Bremerton (R. 50). It is admitted the claimants, with the possible exception of Henry I. Mayer and William J. Sheffield, had nothing to do with the receipt or handling of materials (R. 51) until after the materials had arrived and were at the appellees' warehouse. None of the claimants were employed in the warehouses. The evidence is clear that the appellees were the ultimate consumers of the goods and the materials had reached their final destination and had come to rest. Any work which the claimants may have performed in connection with the materials after their receipt by the appellees at the warehouse or on the job site was a local transaction and not within the scope of the Act. *Higgins v. Carr Brothers Co.*, 317 U.S. 572; *Domenech v. Pan American Standard Brands*, 147 F. (2d) 994.

Claimants John W. Jameson had no duties except as head timekeeper (R. 6, 50). He never had any connection, either directly or indirectly, with the movement of goods in commerce. Like the cook in *McLeod v. Threlkeld, supra*, and the head timekeeper in *Damon v. Ford, Bacon & Davis, supra*, his activities

were too remote from any movement of commerce to be a part thereof.

Claimants A. W. Hall, Ralph O. Lund, Paul Mehner, Glenn E. Tyler and A. W. Torn also had no direct connection with the movement of materials required for the construction work. They were employed as draftsmen and performed various additional duties such as inspection and field engineering. As one of their incidental duties they estimated the amount of supplies to be ordered and submitted their estimates to appellees' purchasing agent who placed all orders. So far as appears they did not specify sources of supply. That their work in estimating supplies needed may have affected interstate commerce is not enough to indicate coverage. *Kirschbaum v. Walling, supra; McLeod v. Threlkeld, supra.* On the record before the Court, it was not shown that any substantial part of claimants' activities related to interstate commerce as required by the rule announced by the Supreme Court in *Walling v. Jacksonville Paper Co.*, 317 U.S. 564. In fact, it was not shown that *any* of the activities of claimants were so closely related to commerce as to be part thereof within the test established in the *Threlkeld* case.

In the case of Mayer and Sheffield the evidence is that they were principally engaged in performing

duties as timekeepers working on the "swing shift", and because there was no material clerk on that shift during part of the time, checked and receipted for and oversaw the unloading of intrastate and interstate shipments that arrived on the job during their hours of work (R. 50). There is no evidence to establish the times or dates during which there was no material clerk on their shift and the record is barren of any testimony as to the time spent by the said claimants in checking material shipments, either intrastate or interstate (R. 50). To arrive at any estimate as to whether or not Mayer and Sheffield were substantially or regularly engaged in activities related to receipt of interstate goods, the Court must indulge in conjecture and speculation. There is no evidence as to how much time the material clerk was absent. Nor is there any evidence that interstate shipments arrived regularly and not merely sporadically and infrequently during his absence. As in the case of the draftsmen, the record fails to show that a substantial part of the timekeepers' activities related to interstate commerce as required by the rule of the *Jacksonville Paper Co.* case. Their relationship to interstate shipments was insignificant being merely casual, irregular, and sporadic and clearly falls within the *de minimis* rule.

The Judgment of the District Court should, therefore, be affirmed.

Respectfully submitted,

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